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No. 53

In the Supreme Court of the United States

October Term, 1963

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

HERSCHEL H. FRIDAY
ROBERT V. LIGHT
Attorneys for Respondent
1100 BOYLE BUILDING
LITTLE ROCK, ARKANSAS

M. M. HENNELLY
ST. LOUIS, MISSOURI
W. J. SMITH
LITTLE ROCK, ARKANSAS
OF COUNSEL

[illegible] PRINTING & STATIONERY CO., LITTLE ROCK

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QUESTION PRESENTED

In its Petition for a Writ of Certiorari, petitioner stated the Question Presented as follows:

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored only to that status or seniority which, it could be foreseen at the time they went into service, they would be absolutely certain to achieve. (Pet. 2).

Pointing out that the Record and the decision of the court of appeals did not support presentation of the question so stated, respondent suggested that the question of law decided

by the court of appeals that was dispositive of the appeal was this:

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored not only to that status and seniority that they would have automatically achieved as of right, but for the military interruption of the employment, but also are entitled to such status and seniority as appears in retrospect that there is a high probability they would have achieved? (Brief in Opposition, p. 1).

Petitioner now states the Question Presented in this language:

> Whether, upon completion of training periods of fixed duration, veterans are entitled, under the Universal Military Training and Service Act, to be assigned seniority dates as journeymen based upon the date when they would have completed their training periods and obtained journeyman seniority had they remained continuously in their railroad employment during the duration of their military service. (Petitioner's Brief, p. 4).

Respondent suggests that, as changed, the question is still carefully worded to avoid or ignore the clear standards fixed in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, where seniority rights preserved by the Act were held limited to those which would have come automatically as a matter of right simply by virtue of the passage of time.

STATEMENT

It is stated at page 13 of petitioner's Brief, that the parties stipulated that "had Brooks remained in the Railroad's employ and not entered military service, he would have completed the apprenticeship period on November 3, 1955, and achieved seniority accordingly (B. R. 19)." It is important that the limited scope of this stipulation be made clear. It was not the intent of this stipulation that it should remove all the uncertainties incident to Brooks' completion of the apprenticeship and therefore amount to an agreement that his progression through the apprenticeship was automatic as that standard was used in *McKinney*. Neither the stipulation as made, nor the facts established by the proof, support such a conclusion.

Respondent conceded prior to the commencement of this suit that Brooks was entitled to a retroactive seniority date on the roster at Monroe, Louisiana. Brooks' Complaint so reflects (R. 3). Respondent's position throughout has been that his right to such retroactive seniority arises out of the applicable collective bargaining agreement which is the Memorandum of Understanding of December 4, 1945 (R. 59). As indicated in footnote 9, page 12, of petitioner's Brief, this agreement assigns such retroactive seniority at Monroe only.

The Memorandum of Understanding provides that the returning veteran who completes his interrupted apprenticeship "* * * * be given a seniority date as of the date he would have completed his apprenticeship had he remained in the railroad service." (R. 59). Therefore, in order to assign the rights to which various individuals were entitled under this agreement, it was necessary to adopt a method of computation of the date a given veteran "would have completed his apprenticeship" as that concept is employed *in the agreement*. This

computation necessarily ignores the uncertainties as to when and whether the apprenticeship, in fact, would have been completed. It is these uncertainties that are relevant in testing whether the progression would have been automatic as that concept is defined in *McKinney* for the purpose of determining whether the Universal Military Training and Service Act requires the granting of retroactive seniority. The act requires retroactive seniority only when there is, in fact, an automatic progression. The agreement ignores the automatic progression concept in defining the rights it confers. Petitioner does not now seek any right under the agreement, but abandoned such claims when he filed his Amended Complaint specifically eliminating reference to the Memorandum of Understanding of 1945 (R. 7).

It was with the matter in this posture that counsel undertook to enter into the stipulation previously mentioned relating to the computation of a retroactive seniority date in *accordance with the terms of the Memorandum of Understanding*, and not by virtue of any right to retroactive seniority that might be conferred by the Act. This is the colloquy which petitioner's Brief refers to as a stipulation that Brooks would have completed the apprenticeship on November 3, 1955 but for the military interruption (R. 16):

> "The Court: All right; now, Mr. Light, what is the nature of your testimony?
>
> Mr. Light: Your Honor, the principal issue, I think we all agree, is whether or not the retroactive seniority feature is to be applied at North Little Rock. Now, to reach that it is quite possible, it is essential, I believe, that we find out or that the Court determine what the correct retroactive seniority date will be, if there is to be one. Now, the Railroad Company, *acting pursuant to the collective*

bargaining agreement, has computed what the seniority date would be if he is entitled to a retroactive seniority date, and that date as we compute is November 3, 1955, several months earlier than the one computed by the Government, and a couple of months later, I think, than the one contended for by the plaintiff originally." (emphasis supplied)

The matter was pursued (R. 18-20):

"Mr. Light: I believe we can stipulate, Your Honor, that computed in the manner and by the method that all such computations have been made *since the memorandum and understanding of 1945* that will be in evidence here that Robert Brooks' retroactive seniority, if he is entitled to retroactive seniority, regardless of where that might be, would be November 3, 1955.

Mr. Mott: That was not as I understood prior to recess.

The Court: Well, all right, then, that is not satisfactory to you?

Mr. Light, Your Honor, if I may, let me be candid on what our position is.

The Court: All right.

Mr. Light: *The custom and practice* of the Railroad Company and the Railroad Brotherhood *in interpreting the agreement of 1945* has been that any retroactive seniority be computed in a manner that will develop the date November 3, 1945, to employees in the same or similar position of employees as Mr. Brooks, such seniority to be assigned and placed on the seniority roster at a point where he entered his training, which was Monroe, Louisiana, in this case;

* * *

The Court: * * * Now, do I understand further, Mr. Light, that it would be the position of the Railroad and the Railroad is prepared to concede that if Mr. Brooks is entitled to this same seniority retroactive provision at North

Little Rock *under the Company's practice,* if it were applied to North Little Rock, the date there would be 11-3-55 also?

Mr. Light: Yes, Your Honor, we will concede and stipulate that if — and certainly that is an 'if' —

The Court: I understand it is.

Mr. Light: If he is entitled to retroactive seniority at North Little Rock the date would be November 3, 1955.

The Court: Now, is that what you are trying to reach?

Mr. Mott: That is agreeable, Your Honor; if he is entitled to it at any place that would be the date." (emphasis supplied)

The stipulation thus formulated was subsequently referred to as representing the date on which Brooks would have completed his apprenticeship had it not been for the military service (R. 28, 34). Taken in context with the entire Record, it is clear that these characterizations did not concede that he, in fact, would have completed the apprenticeship on the stated date or any other date. That date simply represented a calculation of when he would have completed the apprenticeship but for the military interruption *if* he had progressed through it satisfactorily for an interrupted 1040 days, *if* his performance of a correspondence course consisting of two written lessons a month had been satisfactory, and *if* he had demonstrated the proper aptitude in the work (R. 23-25).

It has been respondent's consistent position that the uncertainties relating to progression through, and completion of, the apprenticeship, relating to transfer involving exercise of managerial discretion during the apprenticeship, and relating to employment as a journeyman on completion of the apprenticeship, all operate to take this case out of the automatic progression test established by *McKinney.*

SUMMARY OF ARGUMENT

I

Petitioner's apprenticeship, interrupted by military service required demonstration of aptitude for the work during the period of 1040 days on the job, and satisfactory completion of a correspondence course. Under the collective bargaining agreement, petitioner is entitled to a retroactive seniority date on the roster at Monroe, Louisiana, of November 3, 1955. Had he completed the apprenticeship on that date, he had no contract right to employment as a journeyman by respondent. These circumstances do not constitute automatic progression as a matter of right as those terms are used in the *McKinney* decision to define the rights preserved by the Act.

The Act does not provide a benefit in terms of seniority to the veteran over those workers left behind, but simply keeps him on parity with them. Under it, petitioner was entitled only to restoration without loss of his seniority as an apprentice. He seeks retroactive seniority in a higher position to which his advancement was not automatic, but only probable.

The courts have long recognized that the training, experience and proficiency to be acquired in an apprenticeship is not satisfied by the mere passage of time. It consistently has been held, both before and after *McKinney*, that the Act does not secure retroactive seniority in the higher position when advancement is made at the end of a traditional type apprenticeship which was interrupted by military service. This result follows whether the dual standards contained in Sections 9 (c) (1) and 9 (c) (2) of the Act be considered alternative or cumulative. Under Section 9 (c) (1) an apprentice on furlough or leave of absence would not accrue seniority creditable toward

journeyman's seniority in the event of a later advancement. Under Section 9 (c) (2), if the apprentice is considered to have continued in "such employment" during his military absence he was an apprentice when he left and an apprentice when he is restored. The escalator principle would not protect his seniority in the higher position to which advancement is later made because under the collective bargaining agreements seniority gained in the apprenticeship is not creditable toward seniority as a journeyman when that advancement is made.

McKinney held that those benefits that it is highly probable a veteran would have achieved are not within the protection of the Act, and fixed the standard as one of automatic progression as a matter of right. The test now suggested by petitioner fails to rise even to the level of the rejected high probability standard. Petitioner seeks reversal of *McKinney* and adoption of a preponderance of the probabilities as the test. This is contrary to congressional intent and the prior decisions of this Court.

II

The claim for retroactive seniority by virtue of a transfer at a point other than that where the collective bargaining agreement would assign it presents a somewhat novel question. Petitioner had no right to the transfer from St. Louis to Little Rock. It was accomplished on his request addressed to the discretion of management. It was neither automatic nor based on contract right.

There is no logical reason that the *McKinney* standard should not apply to transfers as well as promotions. The district court's conclusion that the significant factor was the fact

that petitioner did transfer, not whether he did so as a matter of contract right, is contrary to this Court's declaration in *McKinney* that gratuitous benefits conferred by management do not thereby enlarge the veteran's rights. The basic presumption that the veteran would have remained continuously in the employment permitted by the Act does not authorize further presumptions that he would have selected any particular one of the various employment options that might have been available to him if he had, in fact, remained in the civilian employment.

The court of appeals expressly found is unnecessary to pass on whether the automatic standard applies to transfers, but respondent continues in its position that, aside from the other considerations involved in the case, the transfer feature alone is sufficient to take petitioner's claim out of the protection of the Act.

ARGUMENT

I.

THE ACT DOES NOT SECURE RETROACTIVE SENIORITY FOR PETITIONER BECAUSE HIS PROGRESSION THROUGH THE APPRENTICESHIP AND ADVANCEMENT TO JOURNEYMAN WERE NEITHER AUTOMATIC NOR MATTERS OF RIGHT.

The petitioner's employment by respondent, interrupted by military service, was an apprenticeship the successful completion of which required actual on-the-job training for 1040 working days. Also required was satisfactory performance in a correspondence course consisting of two written lessons a month and the demonstration of the proper aptitude in the work (R. 23-25). After his return from military service, he actually completed the apprenticeship on January 23, 1958. He was immediately thereafter employed as a journeyman machinist and assigned a seniority date as such coinciding with the date of completing his apprenticeship. In this suit he seeks a retroactive seniority date to be assigned on the roster at North Little Rock of November 3, 1955, which date is the subject of the stipulation heretofore mentioned.

Had petitioner completed his apprenticeship on November 3, 1955, there was no obligation on the part of respondent under the collective bargaining agreement then in effect between it and the labor organization of which petitioner was a member to employ him as a journeyman (R. 61-63). Under Rule 37 (e) as it read at that time, a former apprentice established seniority as a mechanic only if retained in service upon completing the apprenticeship (R. 36, 62). The trial court found that the collective bargaining agreement "* * * appears

to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, * * *" (R. 78). The court of appeals found on examination of the entire written collective bargaining agreement that "There is no contract rule which compels defendant to employ any particular graduate apprentice as a journeyman upon completion of his apprenticeship." (R. 88). The court of appeals was furnished, by agreement of counsel and at the court's request in the course of oral argument, complete copies of the applicable collective bargaining agreements. The district court had the complete copies before it, but only parts were designated for formal inclusion in the Record (R. 38-38, 60).

However, the district court held that petitioner was entitled to the retroactive seniority date, resting its decision on the evidence that there were some apprentice machinists working in an upgraded position as machinists at the North Little Rock shops in November and December, 1955, (R. 21-22), and testimony that the Railroad Company has recognized that its right to upgrade an apprentice depended on the unavailability of qualified journeymen (R. 49-50). The obligation thus recognized was described as an election between hiring the available journeyman who had just finished his apprenticeship, or loss of the right to retain upgraded apprentices of that craft at that point (R. 52).

The district court considered these facts to constitute a showing that petitioner would have been employed as a machinist at North Little Rock if he had finished his apprenticeship there on November 3, 1955, as a matter of right, and as an advancement in status that would necessarily have occurred simply by virtue of continued employment, as those concepts

are enunciated in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. 265. However, while accepting the trial court's findings as to the shortage of machinists at North Little Rock in 1955 and that graduate apprentices were therefore readily employed, the court of appeals held that these findings did not support the conclusion that the apprentice's right to advancement was automatic so as to meet the test of *McKinney* (R. 88).

It is now settled that the benefits protected by the Act are those which would have necessarily come as a matter of right simply by virtue of the expiration of time had the veteran not had his employment interrupted by military service. This Court said in *McKinney*, with reference to the Act:

> "Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment."

While *McKinney* says that the veteran is not to be disadvantaged by serving his country, it is also pointed out that the Act does not envisage overriding managerial discretion with respect to promotion nor does it sanction interfering with the terms of collective bargaining agreements relative to opportunities for advancement.

That the Act was not designed to give the veteran a benefit in terms of seniority over the workers left behind, but was to merely insure that he remained on parity with them in seniority was also made clear in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, in this language:

> "* * * But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. * * * No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provision for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

What did the Act, so construed, entitle petitioner to receive on his return from military service? On the facts alleged in the Complaint, and the terms of of the collective bargaining agreements received in evidence, he was entitled to restoration to his job as an apprentice machinist at Monroe without loss of seniority as such. He was entitled to such pay as his seniority protected by the Act would call for, and was entitled to the same opportunity to complete his apprenticeship as he would have enjoyed if he had remained continuously in the civilian employment. All of these benefits were conferred upon him, and there is no complaint now made as to their sufficiency. These things would have come to him, and the other apprentices alike, automatically under the applicable collective bargaining agreement had he remained continuously in his railroad job.

However, as pointed out by the court of appeals, Brooks seeks more than that here. The reasoning of that Court was simply that completion of the apprenticeship and employment as a journeyman would not have occurred by way of automatic progression as a matter of right if petitioner had remained continuously in his civilian employment. His claim did not meet the *McKinney* standard. These advancements would not necessarily have occurred to petitioner simply by virtue of continued employment. A training period with

mandatory standards as to aptitude and academic proficiency was required. The employer's discretion preserved in the collective bargaining agreement to select journeymen from among graduate apprentices, although liberally exercised in time of shortage, is nonetheless the final test that petitioner and others similarly situated must meet before there is any right to employment as a journeyman or seniority in that capacity. It may be highly probable that petitioner would have made the advancement to journeyman had he remained in the civilian employment, but *McKinney* made it clear that the test was one of automatic progression.

In construing this Act the courts have long recognized that the training, experience and proficiency to be acquired in an apprenticeship is not satisfied simply by the passage of time. Long before *McKinney* it was said in *Spearmon v. Thompson*, 167 F.2d 626 (8 Cir., 1948), cert. den. 335 U.S. 822:

> "If proficiency was really the test, no Act of Congress could supply it and these three appellants would have been helpers when they were inducted and would still be 'helpers' when they were reinstated."

The same view was expressed in *Addison v. Tennessee Coal, Iron & Railroad Co.*, 204 F.2d 340 (5 Cir., 1953), where a machinist who had sustained a military interruption of his apprenticeship sought to have his seniority date as a machinist fixed retroactively to the date when he probably would have completed his apprenticeship but for the military service. Rejecting his argument that the Act provided such a preference, the Court said:

> "* * * thus, where promotion or pay is dependent upon qualifications other than mere length of service, the time of service in the armed forces can not be treated as the equivalent of such qualifications."

After *McKinney* confirmed the correctness of these decisions, the courts of appeals had no difficulty in applying the standards it defined. In *Bassett v. Texas & Pacific Railway Company*, 258 F.2d 819 (5 Cir., 1958), a carman apprentice had sustained a military interruption of his apprenticeship and, upon returning to the railroad employment and completing his apprenticeship, sought a retroactive date on the carman's seniority roster. It appeared, as it does in the case at bar, that the apprentice had no automatic or contractual right to promotion to journeyman status, and even the completion of the apprenticeship was conditioned on performance in a course of work to the satisfaction of certain railway officials. Characterizing the plaintiff's contention to be "* * * that 'without loss of seniority' refers not only to seniority in the vacated position but also to seniority in any position which he probably would have obtained upon constant employment", the Court held that the Act did not confer any such right and made this commentary on *McKinney*:

> "Certainly, the McKinney case clearly decides the question of whether a veteran after re-employment is entitled to a retroactive seniority status upon a subsequent promotion where he had only a high probability of promotion had he not been in the service. Only where the promotion or advancement is automatic can the veteran claim his right."

The Eighth Circuit Court made the same disposition of a similar claim in *Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co.*, 259 F.2d 122 (8 Cir., 1958), where the plaintiff had been a carman's helper at the time of his military induction, and after return to the civilian employment sought an adjusted seniority date on the carman's seniority roster to give him the benefit of the time spent in the military. Again it was found that since he would not have "had an absolute contract right to be automatically promoted", his claim was

outside of the protection of the Act. This observation was made respecting the *McKinney* decision:

> "That case authoritatively put to rest the question of whether returning veterans are entitled to retroactive promotions and seniority rights by holding that, to entitle the veteran to relief, the facts must show that the veteran would have been upgraded automatically, and that a strong probability of advancement will not suffice."

Judge Blackmun ably summarizes the line of demarcation that the cases have drawn on the question of retroactive seniority when advancement is made to a higher position at the end of an apprenticeship type of work period that was interrupted by the military service. In *Tilton, et al v. Missouri Pacific Railroad Company*, 306 F.2d 870, 875 (8 Cir. 1962) he makes these two classifications:

> "(a) Where it is found, or where the parties have stipulated or conceded, that, but for the period of military service, the work period would have been completed by a date certain or in a particular order among the upgraded employees, or, in other words, that the claimant would have been promoted automatically or by reason of mere passage of time, the claimant-veteran is entitled to seniority in his new position retroactively to that earlier date or in that order. (citing cases).
>
> "(b) On the other hand, if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable — even highly probable — retroactive seniority is withheld."

These court decisions withhold retroactive seniority in the higher position when advancement is made at the end of a traditional apprenticeship program. Thus it might be said that a veteran who was inducted while an apprentice is not restored, as directed by Section 9 (c) (2) of the Act, to "such status in his employment as he would have enjoyed if he had

continued in such employment continuously from the time of his entering the armed forces until the time of his restoration." That is, *if* he had remained continuously in the civilian employment he would have completed part or all of the apprenticeship and would have been this much further along toward journeyman's status. Despite this, he is still required to complete the apprenticeship work period on his return from military service without credit for the military service in the form of accelerating the completion of the apprenticeship or advancing his seniority as a journeyman. However, this treatment is perfectly consistent with the teachings of *McKinney* that the Act does not guarantee a perfect reproduction of what might have been, and that its purpose is to secure only those benefits that would have come automatically and as a matter of right to the veteran.

This treatment also gives effect to the language of Section 9(c)(1) which appears to offer an alternative standard for measuring the rights of restoration conferred by the Act. It is there provided that the returning veteran:

> "* * * shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall, be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, * * *[1]."

---

[1] Petitioner points out in his Brief, p. 35, fn. 19 that during the House debates Representative May identified the chief purpose of this legislation to be preservation of seniority of railroad employees. That the *furlough* concept was related to the peculiar concern for railroad employees is evident from Mr. May's explanation immediately following his statement quoted by petitioner: "In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement." 86 Cong. Rec 11072.

It appears beyond dispute that an employee engaged in a traditional apprenticeship requiring a fixed number of days of training would not satisfy those work requirements while on furlough or leave of absence. On return from such an absence, the uncompleted training would still be a requisite to attaining the proficiency constituting qualification for advancement.

Thus, application of the furlough or leave of absence standard does not permit acceleration of the apprenticeship, and retroactive seniority in the higher position when advancement is made at the end of a traditional apprentice type program. Retroactive seniority is required only when the advancement is automatic as a matter of right as held in *McKinney*. However, apprentices are protected by the Act in the right to restoration *in the apprenticeship program* at the point of departure, with escalator benefits as to wages and collateral benefits, and seniority *within the apprenticeship program*. These they would have had if on furlough or leave of absence. On the other hand, furlough or leave of absence would neither serve to advance them in completion of the apprenticeship, nor produce a retroactive seniority date as a journeyman if advancement to that status was later made.

The result achieved by application of the furlough or leave of absence standard is not inconsistent with the continuous employment standard in Section 9 (c) (2). The statutory mandate expressed there is that the veteran be restored to such a status as he would have had if he had remained continuously "in such employment". Thus an apprentice is restored as an apprentice with such benefits as he would have attained if he had remained an apprentice during the military service. His seniority in "such employment", i.e., the apprenticeship, has been preserved. However, the seniority in a

higher position to which advancement is later made is not preserved simply because the collective bargaining agreements in the Record, applicable to veterans and non-veterans alike (R. 62), provide that seniority gained in the apprenticeship is not creditable toward seniority as a journeyman when that advancement is made.

It would therefore seem that whether the standards provided in Sections 9 (c) (1) and 9 (c) (2) be regarded as alternative[2] or cumulative, the same result is reached respecting apprentices engaged in the traditional type of program.

Considerable space is devoted in petitioner's brief to an effort to distinguish *McKinney* from the case at bar. However, the brief culminates in what appears to be an abandonment of that effort with a plea that *McKinney* be overruled. In his final paragraph of argument (petitioner's brief, p. 36) petitioner asks this Court to hold that a veteran is entitled under the Act to any benefit he can show "(with the certainty generally requisite to establish legal rights)" that he would have attained by virtue of the continued employment.[3] Presumably petitioner's suggested test of certainty has reference to a preponderance of the evidence since that is the customary standard of proof in an ordinary civil case. *McKinney* held that

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[2] This Court has referred to these standards as providing alternative tests of the veteran's right. *Trailmobile Co. v. Whirls*, 331 U.S. 40, 58. His statutory rights were there characterized in this language: "He was to be restored and kept, for a year at least, in the same situation as if he had not gone to war but had remained continuously employed *or* had been 'on furlough or leave of absence.'" (emphasis supplied).

[3] The degree of proof by which a veteran must establish his entitlement to any right conferred by the Act is not here involved. The question presented in this case is the scope of the right that is created by the statute. There seems no reason to doubt that the requisite quantum of evidence by which a veteran must establish any essential disputed fact would be the preponderance of the evidence. However, in defining the scope of the right conferred, this Court said in *McKinney* that only those benefits that would have come automatically and as a matter of right are included.

the Act secured only those benefits that would have come automatically and as a matter of right and specifically rejects the proposition that those benefits which the veteran can show a high probability that he would have attained are also secured. Now petitioner seeks to have the Court to retreat from *McKinney's* rejection of the high probability standard, and to go even further and establish the test as simply a preponderance of the probabilities.

II.

THE ACT DOES NOT SECURE SENIORITY FOR PETITIONER AT NORTH LITTLE ROCK BECAUSE HE HAD NO RIGHT TO TRANSFER THERE NOR WAS HIS MOVE THERE THE RESULT OF ANY FORM OF AUTOMATIC PROGRESSION.

The case at bar presents the conventional facts relating to the non-automatic progression through an apprenticeship and advancement to journeyman status. However, a somewhat novel feature here presented is that by virtue of a transfer from one point of employment to another, the veteran seeks retroactive seniority at a different place than that at which the collective bargaining agreement would assign it. This is significant when testing the petitioner's claim against the standard of the Act because, if seniority on the North Little Rock roster is secured by the Act, it must appear that petitioner not only would have automatically become a machinist on November 3, 1955, if he had remained continuously in the employment, but also that he *automatically* would have made this advancement *at North Little Rock* at that time. This record clearly demonstrates that there was no automatic progression that would have brought petitioner to North Little Rock, nor did he have any contract right to make such a transfer. His own testimony is clear on the point (R. 32):

> Q. What were the circumstances by which you gained your employment at Little Rock or the North Little Rock shop?
>
> A. By request of transfer.
>
> Q. Will you elaborate a little bit more?
>
> A. I asked for a transfer to the North Little Rock shop and it was approved by the master mechanic or shop superintendent, whichever you want to call him, and it was

approved by the master mechanic at North Little Rock and the master mechanic at St. Louis.

The transfer was neither automatic nor based on contract right.

That the *McKinney* standard applies equally to transfer as well as promotion seems to be logically indisputable, and it was so held in *Horton v. United States Steel Corporation*, 286 F.2d 710 (5 Cir., 1961), where the court said:

> "To our statement that 'Only where the promotion or advancement is *automatic* can the veteran claim his right', Bassett v. Texas & Pacific Railway Co., 5 Cir., 1958, 258 F.2d 819, 823, may now be added transfer. There was no automatic assurance that, had he been present he would have been transferred. He had no enforceable right to demand that this be done. It was that which the Act undertook to protect and in the absence of it there is no right to relief. Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., 8 Cir., 1958, 259 F.2d 122; Poore v. Louisville & Nashville R. Co., 5 Cir., 1956, 235 F.2d 687, 692."

The district court was of the opinion that the significant factor relating to the transfer was the fact that petitioner did transfer to North Little Rock instead of whether he did so as a matter of contract right (R. 79-80). This view is contrary to the principles laid down in all of these cases, and is directly inconsistent with this Court's declaration in *McKinney* that when the employer gives more than is required by the Act or by contract the veteran's rights are not thereby enlarged. As stated at 357 U.S. 273:

> "Respondent asserts that petitioner was in fact assigned to the group l position of assistant cashier through a mistake of law. Whatever the reason, the fact of employment in the higher position did not enlarge petitioner's rights under either the collective bargaining agreement or the statute. Since respondent was not obligated to give petitioner the higher position at all, when it did so it was not bound to give him a seniority date earlier than that

to which any employee similarly promoted would have been entitled."

To support the district court's conclusion it is necessary to show that petitioner was on an employment "escalator" which would have automatically carried him to North Little Rock by November 3, 1955, as a matter of contract right. The record does not furnish such support. It is clear that he could not have gone to North Little Rock as a matter of contract right, and the Act no more authorized the presumption that he would have automatically gone there than that he would have automatically gone to Lake Charles, Kansas City, Osawatomie, or any other point on respondent's system.

It would seem that the only presumption afforded by the Act as an aid in reconstructing "what might have been" must be founded on the language of Section 9(c) (2) "* * * if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." This standard necessarily seems to authorize the basic presumption of continuous employment, and thus avoid defeat of a veteran's claim because of the bare possibilities (as they are characterized at page 34-35 of petitioner's brief) that he would have been discharged due to unsatisfactory work or terminated his employment because of sickness. Similarly, his claim would not be jeopardized by the bare possibility that he would have voluntarily quit his job. However, neither the language of the Act nor the prior decisions of this Court provide a basis for additional presumptions that he would have been beneficiary of exercised managerial discretion or that he would have chosen any particular course respecting employment options that might have been available to him.

The court of appeals expressly found it unnecessary to pass on the question of whether the automatic standard applies to transfers such as here involved because of its conclusion that the judgment should be reversed and dismissed for the reasons heretofore discussed (R. 89). Respondent continues in the position urged in both lower courts that, aside from the other considerations involved in the case, the transfer feature alone operates to take petitioner's claim out of the protection of the Act.

The benefit here sought by petitioner is not an absolute benefit such as the right to re-employment or the right to a certain pay scale. Here he seeks an advantage in his employment relative to, and at the expense of, his fellow workers. Their rights to earned seniority are entitled to as much consideration and protection as the alleged right for which petitioner contends. If this advantage is not really on that the Congress has provided for him in the Act, then awarding it to him would be not only an unearned windfall for petitioner but also would amount to an unjust deprivation of earned rights of his fellow workers. The Congressional scheme was not directed toward making the veteran whole. This Court so observed in *McKinney* (357 U.S. 271):

> "However, 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled."

The loss of probabilities and possibilities is one imposed on all veterans alike. Petitioner has failed to bring his claim out of that class.

CONCLUSION

It is respectfully submitted that the decision of the court of appeals should be affirmed.

HERSCHEL H. FRIDAY
ROBERT V. LIGHT
Attorneys for Respondent
1100 BOYLE BUILDING
LITTLE ROCK, ARKANSAS

M. M. HENNELLY
ST. LOUIS, MISSOURI
W. J. SMITH
LITTLE ROCK, ARKANSAS
OF COUNSEL

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